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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAREN M. STADTHERR, et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 00-2471-JAR
ELITE LOGISTICS, INC., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

MEMORANDUM AND ORDER
GRANTING IN PART RECOVERY OF COSTS

This matter is before the Court regarding the appropriateness of awarding costs to the defendant Raymond Corporation ("Raymond") in this litigation. Raymond submitted a Bill of Costs (Doc. 298) which was assessed by the Clerk in the amount of $10,845.65 (Doc. 309). Plaintiffs filed a Motion to Retax Costs pursuant to Fed. R. Civ. P. 54(d) and Local Rule 54.1 (Doc. 311) and Raymond has responded (Doc. 312). For the reasons set forth below, the Court grants plaintiffs' motion in part.

Background

This is a wrongful death action arising out of an accident that occurred on July 5, 2000, at a grocery distribution warehouse facility owned by defendant Associated Wholesale Grocers, Inc. ("AWG") in Kansas City, Kansas. The accident occurred when an employee of defendant Elite Logistics, Inc. ("Elite") was transporting plaintiff's decedent, William Stadtherr, and an AWG

employee through the warehouse, as they stood on a work platform/basket that was attached to the forks of a Raymond Model 31 truck ("the forklift"). Raymond manufactured and sold the forklift, a piece of powered industrial equipment that is used by an operator to pick up and transport pallets of product or other large items. While traveling through the warehouse, the forks were raised, Mr. Stadtherr's head struck the ceiling, and he suffered fatal injuries.

Neither of plaintiffs' liability experts opined that the forklift malfunctioned, was defective or unreasonably dangerous, nor that Raymond's negligence caused Mr. Stadtherr's injury. Elite was the owner of the forklift after June 1, 2000, and was responsible for the operation, use and maintenance of the forklift.

Plaintiffs filed a complaint against Elite, alleging that Elite's employee's negligence caused Mr. Stadtherr's death. Elite sought to compare the fault of Raymond based on a theory of defective design of the forklift. Plaintiffs amended their complaint to add Raymond as a defendant.

Plaintiffs abandoned their claim of products liability against Raymond in the final Pretrial Order, but raised two additional claims against Raymond at that time: 1) *res ipsa loquitur* and 2) "adoption" of Elite's claim of product liability against Raymond. Raymond moved for summary judgment, which was granted (Docs. 221 and 244). The Court was not persuaded by plaintiffs' novel "adoption" argument and rejected their claim of *res ipsa* as well. Although Raymond was dismissed as a party defendant to the lawsuit, it remained a party for the limited purpose of comparative fault.

Plaintiffs, who had filed a *Daubert* motion objecting to Elite's expert witness incorporating Raymond's similar motion, pursued that objection once Raymond was no longer a

defendant. Plaintiffs were successful, and Elite's product liability expert was not allowed to testify regarding the forklift. The parties subsequently settled the case prior to trial.

Raymond submitted a Bill of Costs seeking $11,749.52 from plaintiffs. The clerk assessed costs in the amount of $10,845.65 and plaintiffs request this Court to retax those costs. Plaintiffs object on two grounds: 1) Raymond's participation in this case was not ordinary; and 2) many of the expenses are not proper under 28 U.S.C. sec. 1920.

Analysis

1. Discretionary denial of costs

Rule 54(d)(1) provides, in relevant part, "costs other than attorneys' fees shall be awarded as of course to the prevailing party unless the court otherwise directs." "The allowance or disallowance of costs to a prevailing party is within the sound discretion of the district court."[1] The Tenth Circuit has clarified, however, that this discretion is limited in two ways. "First, it is well established that Rule 54 creates a presumption that the district court will award costs to the prevailing party."[2] Second, if the district court declines to award costs, it must state a valid reason for its denial.[3]

The Tenth Circuit has discussed various circumstances in which a district court may properly exercise its discretion to deny costs, including when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or

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[1] *Zeran v. Diamond Broadcasting, Inc.,* 203 F.3d 714, 722 (10th Cir. 2000) (citing *Homestake Mining Co. v. Mid-Continent Exploration Co.,* 282 F.2d 787, 804 (10th Cir. 1960).

[2] *Cantrell v. IBEW Local 2021,* 69 F.3d 456, 458-59 (10th Cir. 1995).

[3] *Id.* at 459.

unnecessary, when recovery was insignificant, or when the issues were close or difficult.[4] The court should not consider the ability of the prevailing party to pay its own costs,[5] nor should it deny costs because it does not condone the prevailing party's extra-judicial conduct.[6]

The reasons presented by plaintiffs are insufficient to overcome the presumption that Raymond, as the prevailing party on summary judgment, is entitled to costs, and do not justify penalizing Raymond. Plaintiffs' characterization of being "forced" to join Raymond as a party defendant because of the structure of the comparative fault laws is disingenous. Plaintiffs made a calculated decision to join Raymond to avoid any "phantom" finding of fault, advancing the novel argument that it "adopted" Elite's product liability claim against Raymond as well as asserting a claim of *res ipsa*. Plaintiffs joined Raymond as a defendant and actively pursued claims against it, with the express intent of obtaining an enforceable monetary judgment against Raymond. After examining the litany of reasons plaintiffs cite for denying Raymond's costs, the Court declines to exercise its discretion to deny costs across-the-board.

2. Specific items challenged as untaxable

Raymond argues that if costs are to be awarded under Fed. R. Civ. P. 54(d)(1), the Court should carefully review those assessed by the clerk. In conducting such a review, the court makes a *de novo* determination.[7] Rule 54(d)(1) provides that costs shall be allowed to the prevailing party "unless the court otherwise directs." Thus, taxation of costs rests within the

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[4] *Zeran,* 203 F. 3d at 722 (citing *Cantrell,* 69 F.3d at 459).

[5] *Tinkler v. U.S. by F.A.A.,* 1989 WL 35998 (D. Kan. March 30,1989) (citing *White & White, Inc. v. American Hosp. Supply Corp.,* 786 F.2d 728, 730 (6th Cir. 1986) (quotation omitted)).

[6] *Zeran,* 203 F.3d at 722.

[7] *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 674 (D. Kan. 1994).

court's sound discretion. Rule 54(d) is governed by 28 U.S.C. sec. 1920, which provides that a judge or a clerk of the court may tax as costs certain categories of expenses incurred during litigation, including the costs of depositions, court transcripts and copying fees.[8] Not all expenses associated with litigation are recoverable against the non-prevailing party, and "[i]tems proposed by winning parties as costs should always by given careful scrutiny."[9] A finding that a requested cost is statutorily authorized creates a presumption favoring its award,[10] and "[t]he burden is on the nonprevailing party to overcome the presumption in favor of the prevailing party."[11]

In its bill of costs, Raymond requests costs in the amount of $11,749.52,[12] all of which are claimed by Raymond as falling within the scope of sec. 1920. The Court's review focuses on four specific categories of costs: 1) long distance, facsimile and delivery charges; 2) photo-copying charges; 3) costs of deposition transcript; and 4) min-u-scripts, diskettes, overnight delivery, late fees and second copies of depositions.

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[8]28 U.S.C. sec. 1920 provides in pertinent part:
A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
28 U.S.C. sec. 1920.

[9]*U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir. 1988) (quoting *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964)).

[10]*Green Construction,* 153 F.R.D. at 675.

[11]*Cantrell v. IBEW Local 2021,* 69 F.3d at 458-59 (citation omitted).

[12]Plaintiffs point out a calculation error in Raymond's bill of costs, which Raymond attributes to omission of an invoice for a deposition, and attaches to its response. Plaintiffs do not challenge this issue in their reply and the Court accepts Raymond's total amount of costs as $11,749.52.

a. long distance, facsimile and delivery charges

In the Clerk's taxation of costs, the following charges were disallowed: long distance charges of $366.92, fax charges of $121.60 and delivery charges of $155.53. Raymond does not respond to this issue, and the Court will also disallow these costs as they are not appropriate under sec. 1920.

b. photocopying charges

Plaintiffs challenge items 3 and 4 in Raymond's bill of costs for photocopying charges in the amounts of $2,900.13 and $773.36. These copies were responsive to Elite's discovery requests. Section 1920(4) allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case."[13] "As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery; because the producing party possesses the original documents, such papers are not 'obtained' for purposes of sec. 1920(4). Thus, because Raymond possessed the original documents of which photocopies were made in response to Elite's discovery requests, the Court denies these costs.

c. deposition transcripts

Plaintiffs challenge the costs of deposition transcripts of 11 witnesses noticed and deposed by plaintiffs in the total amount of $928.15. Sec. 1920(2) allows the court to tax as costs the fees of a court reporter for any part of the stenographic transcript necessarily obtained for use in the case, including deposition expenses submitted to the court on a successful motion

[13] *Pehr v. Rubbermaid, Inc.,* 196 F.R.D. 404, 407 (D. Kan. 2000) (citing *Phillips USA, Inc. v. Allflex USA, Inc.,* 1996 WL 568814, at *2 (D. Kan. Sept. 4, 1996).

for summary judgment.[14] Deposition expenses submitted to the court may be taxed if the deposition reasonably appeared necessary at the time it was taken.[15] Depositions not necessarily obtained for use in the case are not taxable as costs, and will not be allowed, for example, where the deposition is "purely investigatory in nature."[16] "Though use at trial by counsel or the court readily demonstrates necessity, if materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity and award the recovery of costs."[17]

Plaintiffs contend that the depositions were "simply taken for discovery and investigatory purposes," noting that Raymond did not cite any of the depositions in its motion for summary judgment. These depositions were of warehouse workers present at the time of the accident, including Mr. Ng, who was in the basket with Mr. Stadtherr, all of whom were potential witnesses at trial. The Court has great discretion to tax these costs and is satisfied that the referenced deposition transcripts, while not incorporated into Raymond's motion for summary judgment, were obtained for use in the case and not for general investigative purposes. The Court finds that Raymond has demonstrated that the deposition transcripts were necessarily obtained for use in the case and will be allowed in the amount of $928.15.

d. Min-U-scripts, Diskettes, Overnight Delivery, Late Fees and Second Copies of depositions

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[14] *See* 10 Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure:* Civil 2d sec. 2676 (1983).

[15] *State of Kan. ex rel. Stephan v. Deffenbaugh Industries., Inc.,* 154 F.R.D. 269, 270 (D. Kan. 1994).

[16] *Ortega v. City of Kansas City, Kan.,* 659 F.Supp. 1201, 1218 (D. Kan. 1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir. 1989); *Kansas Teachers Credit Union v. Mutual Guaranty Corp.,* 982 F.Supp. 1445, 1447 (D. Kan. 1997).

[17] *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d at 1246.

Plaintiffs challenge costs for these items in the total amount of $891.33. Raymond does not respond to this issue. The Court notes that, upon review of the clerk's assessment, charges for ASCII disks have been excluded in the total amount of $260.00, and the Court will also exclude these charges. As for the balance of the items, the Court finds that charges for overnight delivery and second copies of depositions, including min-u-script copies, are items obtained solely for the convenience of Raymond and are not included under sec. 1920 as appropriate costs.[18] Thus, the Court will exclude these costs in the total amount of $891.33.

3. Attorney fees

Raymond contends that it is entitled to attorney's fees for responding to plaintiffs' motion to retax costs under 28 U.S.C. sec. 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions under section 1927 are appropriately imposed "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court."[19] Subjective bad faith is not a necessary showing for application of sec. 1927 sanctions. Instead, proper considerations for the court include whether plaintiffs' counsel's conduct, when viewed objectively, imposed "unreasonable and unwarranted burdens on the court and opposing

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[18] *See Battenfeld of America Holding Co., Inc. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 615 n. 1 (D. Kan. 2000).

[19] *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc).

parties," and whether plaintiffs' counsel acted "recklessly or with indifference to the law."[20] An award of sanctions under sec. 1927 is appropriate only where there is a showing of "(1) a multiplication of proceedings by an attorney or other person; (2) by conduct that can be characterized as unreasonable and vexatious; and (3) a resulting increase in the costs of the proceedings."[21] Because sec. 1927 is penal in nature an award should only be made "'in instances evidencing a serious and standard disregard for the orderly process of justice"' and the court must be aware of the "need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests."[22]

Raymond claims that plaintiffs' counsel has taken "diametrically opposite positions, depending on what was at issue,"and that plaintiffs' motion to retax costs is vexatious. Specifically, Raymond complains that when it moved for summary judgment, plaintiffs responded that they had claims against Raymond. Now, in their motion to retax costs, plaintiffs argue that they never made any claim against Raymond, nor did they have a factual basis for that claim because their experts found nothing wrong with the forklift. The issue of plaintiffs' novel theories of recovery against Raymond were resolved previously in this court. While plaintiffs' argument may have proved meritless, the Court declines to label it or this subsequent motion to retax costs as vexatious. As set forth above, some of plaintiffs' objections to Raymond's costs have merit. Raymond's motion for attorneys fees is denied.

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[20] *Id.* at 1507; *In re TCI Ltd.,* 769 F.2d 441, 445 (7th Cir. 1985).

[21] *Steinert v. Winn Group, Inc.,* 2003 WL 1342974, *3 (D. Kan. March 14, 2003) (quoting *Shields v. Shetler,* 120 F.R.D. 123, 127 (D. Colo. 1988)).

[22] *Ford Audio Video Systems, Inc. v. AMX Corp., Inc.,* 161 F.3d 17, 1998 WL 658386, at *3 (10th Cir. Sept. 15, 1998) (quoting *Dreiling v. Peugot Motors of Am., Inc.,* 768 F.2d 1159, 1165 (10th Cir. 1985) (internal quotations omitted).

IT IS THEREFORE ORDERED that Raymond's motion to retax costs (Doc. 309) is GRANTED in part and DENIED in part. The motion is granted with respect to the following charges which are not recoverable in the total amount of $5,208.87: $644.05 for long distance, facsimile and delivery charges; $3,673.49 for photocopying expenses responsive to discovery; and $891.33 for min-u-scripts, diskettes, overnight delivery and second copies incurred for Raymond's convenience. The motion is denied as to the balance of charges, which are allowed in the total amount of $6,540.65. Raymond shall submit a revised bill of costs, reflecting the deductions made in this order, to the clerk within fourteen (14) days of this order.

IT IS FURTHER ORDERED that Raymond's request for attorney fees is DENIED.

IT IS SO ORDERED.

Dated this 24th day of June 2003.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge